Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

OCTOBER TERM, 2003

ROBERT F. GILL AND ANN M. GILL,
PETITIONERS,

v.

GUARDIANSHIP OF ELIZABETH M. GILL,
RESPONDENT.

On Petition for Writ of Certiorari
To The Supreme Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

OWEN L. O'MALLEY
BBO #558253
29 Sohier Street
Cohasset, MA 02025
(781) 383-0379

Dated: December 31, 2003

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QUESTIONS PRESENTED

I. Whether the due process requirements of the Fourteenth Amendment to the United States Constitution apply to state guardianship proceedings, and what should be the standard of proof?

II. Alternatively, even if a person (subject to guardianship proceedings) has been given due process, does that same person have equal protection of the laws and a fair trial if one expert witness' testimony is excluded, while the other expert witness' testimony is admitted?

PARTIES TO THE PROCEEDINGS

Robert F. Gill and Ann M. Gill, Petitioners

Owen L. O'Malley, Counsel for Petitioner-Appellant

Kathleen C. Keville, Guardian Ad Litem

James G. Nelligan, Counsel for Respondent-Appellee

Robert H. Weber, Counsel for Respondent-Appellee

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OPINIONS BELOW

The opinion of the Massachusetts Appeals Court is reported at 58 Mass. App. Ct. IIII.

JURISDICTION

The Appeals Court of Massachusetts entered its judgment on August 5, 2003. The Supreme Judicial Court of Massachusetts denied an application for Further Appellate Review on October 3, 2003. Jurisdiction in this case was conferred on the Suffolk County Probate and Family Court of Massachusetts by Chapter 215, Section 3 of the Massachusetts General Laws.

Jurisdiction in this petition for a Writ of Certiorari was conferred on the United States Supreme Court by 28 U.S. C. Section 1257 (a).

STATUTORY PROVISIONS INVOLVED
U.S. Constitution, Amendment XIV Section 1 Set

The relevant Portions of the M.G.L. c. 201, are set forth in the Appendix, infra, pp. A-29–32

STATEMENT OF THE CASE

Elizabeth Gill (ward) was 70 years old in 2000, and had lived in Boston all her life. She had worked at Boston Children's Hospital for approximately 20 years, had taken care of her mother through her final illness, and had performed all the other duties of a good person, and a good member of the community. For several years, however, she had not taken care of the family property for various reasons including an accident resulting in a broken arm, a serious hip operation, and the loss of her two sisters by death.

Since Elizabeth was initially not physically able or willing to help with her house, I, Owen O'Malley, the undersigned attorney, advised Robert Gill (Gill) her brother to seek a court determined guardianship in order to take care of the family home properly.

The court-provided guardianship petition document includes "mental illness" language which we tried to line out, unsuccessfully. The register's department of the court stated that the language had to be included.

The petition was filed in court on February 24, 2000, to be heard on May 2, 2000. On March 29, 2000 the Suffolk County Probate and Family Court (Moriarty, J.) held a hearing with no notice and granted a "voluntary" conservatorship to Attorney Peter Macy, (Macy) who mis-

represented himself to the court as hired by Elizabeth Gill (ward); but he later admitted in court that he was hired by Spring House, an assisted living facility in Boston where Elizabeth lived. The Court also appointed a Guardian ad Litem, Att. Kathleen Keville who was assigned to file a report on Elizabeth with the Court on August 1, 2000. In fact, she did not file a report on time. Rather, she filed her report on March 27, 2001, almost a year after her appointment, to the great prejudice of the ward. Three explanations were given for the long delay, one of which was provided by the court itself, i.e., that there had been a delay in obtaining the results of a neuropsychological test!

In the fall of 2000, the Conservator Macy, attempted to sell the Gill family home without the knowledge or permission of Elizabeth Gill. When she was informed of this by a neighbor (i.e. that people were going through the house and removing articles) she soon thereafter (in December, 2000) fired Mr. Macy and petitioned the court for his removal as conservator.

It was only then in January, 2001 that the court decided that a guardianship was necessary. A hearing was held on March 27, 2001, and a substitute judge (Sahagian) imposed a temporary guardianship for 90 days, appointing Att. James Nelligan to be guardian until June 25, 2001.

A series of hearings and motions ensued which resolved nothing. Att. O'Malley believing that the Gill family had been treated unfairly then asked for a trial, which was to be one day, namely July 16, 2001. It should be noted that only on May 8, 2001 at one of the hearings Judge Moriarty (at the urging of GAL Kathleen Keville) wrote an order that Att. O'Malley not represent Elizabeth Gill, even though she had specifically requested his help and both sides now wanted him to try to save the family home. Mr. O'Malley reasonably believed that he could represent both sides fairly. He is allowed to do so by

Massachusetts law. (Please see Mass. Rules of Professional Conduct Rule 1.7) Appendix, Pg. A-33.

On June 19, 2001, at a hearing Att. Nelligan requested a 90 day extension of his guardianship. The judge, instead, ordered a 20 day extension, until July 16, even though there was no medical certificate, which is required by law and practice in Massachusetts, contrary to what the Appeals Court states.

A trial was held on July 16, extended by Judge Moriarty to July 18, and July 20, the latter two days of which the ward, Elizabeth Gill, was not subject to a guardianship of any kind.

During the trial Dr. Carol Waldmann, a physician, could not explain rationally why she had changed her mind about the competence of Elizabeth Gill, nor did she have any medical evidence or reports which would explain her new position that Elizabeth Gill needed a guardian.

On the first day of the trial also, Judge Moriarty excluded much of the testimony of Dr. Paul Kuniholm, a physician and also a psychiatrist with a large practice and much experience, who knew Elizabeth Gill.

The last day of trial was July 20, 2001; the judge later called for a status conference on September 20, 2001, and rendered her decision on November 20, 2001, imposing a guardianship on Elizabeth Gill, and granting the guardian a license to sell the house.

The decision was timely appealed on December 19, 2001. During the pendency of the appeal, the guardian, Att. James Nelligan, filed several more motions, resulting in two further Court hearings. He was granted a new license to sell and a new guardianship on February 11, 2002, by a substitute judge (Langlois).

Robert Gill filed a motion to allow oral argument, which was denied on October 5, 2002. Att. James Nelligan also filed for an expedited Appeal, which was granted on April 29, 2003. The Appeals Court of

Massachusetts then, on August 5, 2003 affirmed the original decision of the Probate Court, and the Supreme Judicial Court of Massachusetts denied further Appellate Review on October 5, 2003.

SUMMARY OF THE REASONS FOR GRANTING THE PETITION

Petitioner has set forth compelling reasons for the Granting of the Writ of Certiorari in that the Massachusetts Supreme Judicial Court in affirming the decision of the Suffolk County Family and Probate Court of Massachusetts has allowed to stand a decision in conflict with:

(1) the standard of proof adopted by the Massachusetts SJC itself, and,

(2) in addition, the decision perpetrates a serious injustice upon the Gill family, and may result in many more injustices to older people in Massachusetts and around the nation. See Sup. Ct. R. 10.

The imposition of a guardianship is not a light matter and in fact it can be more devastating to a person than a criminal conviction followed by a prison sentence.

Therefore there is all the more reason why the requirements of due process and fair trial ought to have been observed. In the case of Elizabeth Gill, these requirements were not met. Evidence was suppressed, procedural rules were ignored, and a guardianship was imposed for the convenience of the court. The growing number of older people in our country deserve better protection than what was granted by the court in this Gill matter.

REASONS FOR GRANTING THE PETITION

I. A Person is presumed to be competent in Massachusetts unless shown by the evidence to be incompetent

The case law and statutory law of Massachusetts is well-settled and of long standing, that a person is presumed to be competent unless shown by the evidence presented to be incompetent. That evidence is the "preponderance of the evidence" standard found in civil law. The burden of proof is clearly on the petitioners to prove that the proposed ward is incompetent. The evidence presented should consist of a number of facts that prove that a proposed ward cannot think or act for himself in regard to health, welfare, or safety, and cannot make or communicate informed decisions regarding property or personal financial interests. *Howe v. Howe*, 99 Mass. 88, 98-99 (1868). *Willet v. Willet*, 333 Mass. 323, 130 N.E. 2d 582 (1955). *Fazio v. Fazio*, 375 Mass. 394, 378 N.E. 2d 951 (1978). *Guardianship of Roe*, 383 Mass. 415, 425, 421 N.E. 2d 40, 42 (1981). Page 47 of the last named case (*Guardianship of Roe*) contains important language regarding the stigma attached to Guardianship:

> "...we feel that a conscientious judge, being mindful of the adverse social consequences which might follow an adjudication of mental illness, will subject an individual to guardianship only after carefully considering the evidence and entering specific findings indicating those factors that persuade him that a guardian is needed." Citations omitted.

On March 29, 2000, the Probate Court (Moriarty, J.) granted a conservatorship (without notice) to Att. Peter Macy in behalf of Elizabeth Gill. Att. Macy misrepresented himself to the court as representing Elizabeth Gill, but then in court admitted that he had been brought into the case by Spring House, the assisted living facility where Elizabeth was living and paying most of her bills. She subsequently (on her own) during the court-ordered guardianship obtained her retirement income from Childrens' Hospital and her Social Security income, which her guardian (who has done very little for her) promptly seized.

For one year (March 29, 2000 to March 27, 2001) during the period of the conservatorship, no one came forward to say that Elizabeth needed a guardian, nor was there any evidence to that effect ever offered. The staff at Spring House thought well of her, and liked her.

Judge Moriarty had to have concluded that Elizabeth was competent since she granted a voluntary conservatorship, accepted her "signatures," and required no notice to the family of the conservatorship.

In addition, the following individuals were also explicitly positive about her competence: Peter Macy, Esq., Kathleen Keville, Esq., the GAL, Carol Waldmann M.D., Paul Kuniholm M.D., Lawrence Fieman, Ed. D., and again the staff of Spring House without any known exception.

Att. Kathleen Keville, the GAL, appointed by the court on May 2, 2000, was supposed to have reported back to the court on August 1, 2000, concerning the competence of Elizabeth Gill. In fact, she did not report to the court until March 27, 2001, a date set aside for a hearing on the removal of Peter Macy as conservator, eight months after she should have reported.

Three different reasons have been offered as to why she was late. The fact of the matter, however, is that the report was late to the great prejudice of Elizabeth Gill. For although the GAL, in several interviews of Elizabeth, never once questioned her competence, the GAL later in March 2001, claimed that Elizabeth needed a guardian.

What had actually happened was that Elizabeth had fired Macy as her attorney and sought his dismissal as conservator when she learned that he was in the process of selling her home without her knowledge or permission and had allowed strangers to remove her possessions from the home without her consent. By now (December, 2000) Elizabeth and her brother, Robert Gill, were united in their opposition to Macy's sale of the home and Elizabeth asked Att. Owen O'Malley to represent her, and help her retain her home.

Sometime, apparently, in early 2001, the court determined that a guardianship would be necessary. Prior to the imposition of a temporary guardianship on March 27, 2001, there were no hearings, no findings; there existed no emergency (Elizabeth was living safely at an assisted living facility), there had been no medical reports indicating deterioration of Elizabeth's overall health; and finally, there were false accusations in the GAL report which (though pointed out under cross-examination) went uncommented on in the decision written by the judge (Moriarty). To understand how evidence (or lack thereof) can be manipulated for guardianship proceedings, no better case can be studied than that of *Fazio*, supra.

In *Fazio*, a father and younger son brought a guardianship petition against James Fazio, Jr. (then 30 years old) because he had become difficult to live with, overly concerned as he was with cleanliness, and eliminating all poisons and contaminants in the home. The Probate Court of Middlesex County in Massachusetts granted a temporary guardianship and also a permanent

guardianship. But the Supreme Judicial Court of Massachusetts vacated both decrees, because there were not enough facts found to support the conclusion that the defendant was incapable of taking care of himself by reason of mental illness. *Fazio*, 951. Secondly, the decree of temporary guardianship was vacated because James' "welfare" did not require the "immediate" imposition of a temporary guardian. *Fazio*, 954.

Similarly, the Probate Court in the instant Gill matter, while first granting a "voluntary" conservatorship, suddenly turned 180°, and, relying mostly on the condition of her home, now claimed that a guardianship was needed. There were no other "facts" advanced, other than interviews conducted by "experts," from which meetings the family of Elizabeth Gill was specifically excluded.

With regard to the temporary guardianship there were no immediate exigencies at any time. Elizabeth was residing at an assisted living facility in Boston from with she was able to go out shopping and take public transportation on her own. She was for the most part keeping up with her payments and bills even on her home, and would have been able to continue to do so once she got her retirement pay and social security. Unfortunately, for Elizabeth, her court-appointed guardian has seized all her assets and keeps her a virtual prisoner in a nursing home.

II. Violations of Procedural Laws are Violations of Due Process

An important procedural protection in Massachusetts for a person being subjected to Guardianship proceedings is the medical certificate. Contrary to the holding of the Appeals Court, a medical certificate is required at every stage of a Guardianship (temporary or permanent). (Please see medical certificate) Appendix Pg. A-35, 36.

In the case of Elizabeth Gill, the first medical certificate stated unequivocally that there were "no grounds for appointing a guardian." In 2001, although there had been no medical evidence of deterioration presented, three medical certificates (word for word the same) with different dates were accepted by the Court. At trial, the doctor on the stand admitted that she may have "gotten the wording...from a lawyer" for the certificates. (Please see the transcript of trial, July 16, 2001, pg. 86. See Addendum, pg. A-27.

There was no medical certificate presented on June 19, 2001 when the guardianship was extended contrary to law. A third guardianship and a license to sell real estate was granted by a substitute judge (Langlois, J.) with a medical certificate written by a new doctor, unknown to the Gills, a certificate non-specific in content, unsworn to, and undated. The Appeals Court simply ignored these requirements of Massachusetts law and practice, and allowed the procedural rights of Elizabeth Gill to be violated. If her rights can be so openly ignored, the rights of many other people may similarly be in jeopardy.

III. Alternatively, even if there is shown to be due process, there is no fair trial or equal protection of the laws if valid evidence is missing, contrived, grossly inadequate or suppressed.

A. The Lack of Evidence of the Ward's Mental Incompetence

Again, it is established under the law of this Commonwealth that a person is presumed to be competent unless shown by a preponderance of the evidence that this is not so. *Guardianship of Roe*, 383 Mass. 415, 425 (1981). *Fazio v. Fazio* 375 Mass. 394, 378 N.E. 2d 951 (1978). *Howe v. Howe*, 99 Mass. 88, 98-99 (1868). The burden was therefore on the petitioners for guardianship to

prove that the proposed ward was incompetent; and the evidence should consist of a number of facts that demonstrate that the proposed ward cannot think or act for herself in regard to health, welfare, or safety and cannot make or communicate informed decisions regarding property or personal financial interests. *Id.* See *Willett v. Willett*, 333 Mass. 323, 328-330 (1955); *Lane v. Candura*, 6 Mass. App. Ct. 377, 382-383 (1978).

Yet all of the evidence on July 16, 2001, showed that the ward was mentally competent. Attorney Macy, the conservator, Dr. Waldmann and even Judge Moriarty all concluded as much when the voluntary conservatorship proceedings took place. The GAL, even though unfairly delaying her report for over eight months to the prejudice of Gill, never once seriously questioned the ward's competency in relating factual matters of her life experiences. Lawrence Fieman, Ed.D., who examined the ward at the GAL's request, did not question her competency. The staff at Spring Hill did not question her competency. Dr. Kuniholm has stated under oath in court that, in his opinion, the ward is competent. Finally, both Robert and Ann Gill together with the undersigned attorney knew from their interactions with the ward that she was of sound mind even though she may have needed assistance with transportation and like matters. Importantly, there was no evidence adduced that the ward's condition had deteriorated. Instead, all the evidence showed that she had improved throughout 2001 following her hip operation.

The trial court itself had many opportunities during the course of these proceedings to observe and question the ward while she was in the courtroom. At no time did the ward respond to the court in an inappropriate manner or in a way consistent with the need for guardianship withing the meaning of *Fazio*, supra; she was "articulate" at all times. Even the post-trial examination of the ward

by Dr. William Hudgins, a psychologist, was inconsequential. He is a psychologist who has no authority to conduct a *psychiatric* examination as ordered by the Probate Court. And even if the ward's answers to some of his questions were understandably guarded, suspicious or "forgetful," it must be remembered that Dr. Hudgins was an agent of the lower court which was then seeking evidence to justify its own conclusions that she was mentally incompetent; and Hudgins insisted upon examining the ward with no family present and no way for Gill or for the ward to insure that this examination was fairly conducted.

B. The Absence of Medical Proof Justifying a Temporary Guardian.

The first guardianship of March 27, 2001, was founded upon a determination by a substitute judge (Sahagian, J.) and the full requirements for the appointment of a temporary guardian were not fulfilled. That is, there were no findings as required by G.L. c. 201, Section 14, founded upon medical evidence or otherwise, that the appointment of a temporary guardian was "immediately" required for the proposed ward's welfare. *Fazio*, 375 Mass at 400.

The Second, extended temporary guardianship of June 19, 2001, was unaccompanied by any medical evidence at all and was allowed to lapse after July 16, 2001, with no guardianship in place after that date. In addition, the order also failed to cite the risk of irreparable harm, the requirement for substituted judgment, or any other exigencies which would have warranted an extension of the guardianship. *Waitt v. Badger*, 318 Mass. 101; 108-109 (1945). *Guardianship of Roe*, *supra*. See *Fazio, supra.*

The third temporary guardian was appointed on February 11, 2002, upon medical proof which was unsworn to, undated and non-specific, authored by a doctor unfamiliar with the ward or Gill and in the absence of any showing that the examination was a fair or timely one. See G.L. c. 201, Section 14. Its information contained only conclusory statements and no description of any illness.

Contrary to what the Appeals Court determined, a medical certificate must accompany a guardianship petition. The word "must" appears on the court-provided medical certificate, Uniform Probate Practice XXII. The certificate must be signed and dated by the physician and the examination must have taken place within thirty (30) days prior to the entry of any decree, temporary or permanent. The simple fact on this record is that the medical certificates offered by Dr. Waldmann and Dr. Kaster were contrived, missing or grossly inadequate and should not have been accepted by the Probate Judge over Gill's objection. *Guardianship of Roe, supra. Fazio, supra.* In fact, the entire thrust of all the evidence below was that the ward was doing well and had no need for a guardian. None of the legally insufficient medical evidence persuasively rebuts the presumption established by all of the other proof that the ward was mentally competent and did not need a guardian, either temporary or permanent.

C. The Unequal Treatment of the Parties' Expert Witnesses

Dr. Carol Waldmann, a primary care physician, testified that, contrary to her earlier reports, while the ward does not have any major affective disorder or psychosis, she is no longer able to make decisions in her best interests "due to mental illness." But she was unable to articulate a factual basis for her change of opinion about the ward's "deteriorating" mental state; and she admitted

having spoken to attorneys about her three medical certificates. Moreover, each of the certificates were, word for word the same and obviously tracked the language of *Fazio v. Fazio*, 375 Mass. 394, 399-400 (1978).

Gill's expert was Dr. Paul Kuniholm, a psychiatrist and a physician who had interviewed the ward on three different occasions and found her to be competent. However, Judge Moriarty excluded his testimony because the ward had not been given the *Lamb* warnings. This ruling was made, despite the fact that the ward herself had sought out Dr. Kuniholm precisely so that he could testify in court about her mental competence, thus waiving any privilege.

In the face of this ruling excluding Kuniholm's testimony, Gill moved for a ruling excluding Dr. Waldmann's testimony for the same reason. The Probate judge refused to do so, citing Dr. Waldmann's prior counseling as a physician in this case and her prior report of conversations with the ward, reasons demonstrably insufficient for the different treatment of the parties' medical proof on the issue of the ward's mental competence. Dr. Waldmann, however well intentioned she may have been, reported to the Court that Elizabeth was guilty of substance abuse, a charge repeated by the Probate Court in its decision. This is a grossly false statement for which there was no evidence. The charge also that there was urine and feces in the house was the result of the lack of care for the house by the conservator and/or guardian, not caused by Elizabeth. This disparate treatment of the parties' proof was unfair and denied Gill as well as the ward due process, and equal protection of the laws.

Our American society is aging by leaps and bounds. Unfortunately, many older people may be taken advantage of. One of the ways that this may be done is by imposing a guardianship where it is not warranted or wanted. Elizabeth Gill has never in her life been diag-

nosed by any objective source as having a mental illness. Moreover, she has repeatedly stated that she does not want her home to be sold, and does not want to be a ward of a court-appointed guardian. All the "findings" about Elizabeth referred to by the Appeals Court are for the most part rhetoric, composed by 2 or 3 "experts" totally under court control, and conducted in an underhanded way. Dr. William Hudgins, for example, an expert in violent juvenile delinquents, was appointed by the court after the trial clearly to bolster its case. The court illegally ordered him to conduct a psychiatric examination, which he is not qualified to do.

Elizabeth Gill, who by two physicians' reports, is capable of making many of her own decisions, and who can do crossword puzzles with alacrity, ought not to be reduced to the status of a ward, simply because it is convenient for the court.

In the past there have been conflicts among the states in standards of proof for imposing guardianships. Those standards ought to be made fair and clear for the guidance of all of us.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant the Petition.

Respectfully submitted,

Owen Leary O'Malley
Counsel of Record
29 Sohier Street
Cohasset, MA 02025
(781) 383-0379

Supreme Judicial Court for the
Commonwealth of Massachusetts
One Beacon Street, Third Floor,
Boston, Massachusetts 02108
(617) 557-1020

Owen L. O'Malley, Esquire
29 Sohier Street
Cohasset, MA 02025

RE: Docket No. FAR-13614

GUARDIANSHIP OF ELIZABETH M. GILL

Suffolk Probate & Family No. 00P0417
A.C. No. 2002-P-1117

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 10/03/03, the above-captioned Application for Further Appellate Review was denied. (Cowin, J., recused.)

Susan Mellen, Clerk

Dated: October 3, 2003

Commonwealth of Massachusetts
Appeals Court for the Commonwealth

At Boston,

In the case no. 02-P-1117

GUARDIANSHIP OF ELIZABETH M. GILL.

Pending in the Probate and Family Court for the County of Suffolk

Ordered, that the following entry be made in the docket:

Decrees appointing permanent guardian and temporary guardian pending appeal affirmed.

By the Court,

s/ Ashley Shear, Clerk
Date August 5, 2003

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

02-P-1117

GUARDIANSHIP OF ELIZABETH M. GILL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Robert Gill, the brother of Elizabeth Gill, appeals from the decisions of the Probate and Family Court to appoint a permanent guardian for Elizabeth pursuant to G. L. c. 201, § 6, and to appoint a temporary guardian pending appeal. We affirm.

We refer the parties to the judge's decision for a summary of the procedural posture of the case and the facts, which we do not repeat here. "The appointment of a permanent guardian for a mentally ill person must be based upon findings that the ward (1) is incapable of taking care of himself, (2) by reason of mental illness." *Guardianship of Roe*, 383 Mass. 415, 431 (1981). "The type of evidence necessary to support such a finding, apart from evidence as to mental illness, should consist of facts showing a proposed ward's inability to think or act for himself as to matters concerning his personal health, safety, and general welfare, or to make informed decisions as to his property or financial interests." *Ibid.*, quoting from *Fazio* v. *Fazio*, 375 Mass. 394, 403 (1978).

The judge found that Elizabeth Gill is incapable of caring for herself by reason of mental illness. Our review of the record reveals that the judge's subsidiary findings are amply supported by the record, and her subsidiary findings support her ultimate conclusion. Robert contends the decision was error because the judge relied, in

part, on the opinion of Elizabeth's primary care physician, who opined in 2001 that Elizabeth did not require a guardian but testified a year later at trial that she did require a guardian. Robert contends further that the judge's decision is inconsistent with her March 29, 2000, decision approving a voluntary conservatorship and her notation that Elizabeth had been able to answer her questions and did not suffer from any identified mental illness.

Contrary to Robert's contention, the physician identified the reasons for the change in her opinion, grounded in a decline in Elizabeth's condition (obsessive compulsive disorder) such that Elizabeth could not understand that her mental deficits render her incapable of living alone safely in an unstructured environment. Elizabeth's persistent expression of her belief that she soon would return home to a house that was by all accounts uninhabitable in its present condition, and her rejection of the advice of anyone who suggested that her goal was unrealistic, supported the doctor's opinion that Elizabeth is incapable of caring for herself due to her mental illness. The judge credited the doctor's testimony, and no reason has been shown for us to disturb the judge's credibility assessment.

Further, Robert cites no authority that would bind the judge to an assessment of a ward's condition made at a voluntary conservatorship hearing in the face of a three-day adversarial trial on a guardianship petition conducted over a year later. This is particularly true where there is no showing that the requirements for appointment of a conservator are the same as for appointment of a permanent guardian.[1]

[1] We observe also that Robert's ire at the fact that the doctor altered her opinion on the basis of further evidence of Elizabeth's deterioration is of dubious sincerity given that he him-

Contrary to *Fazio* v. *Fazio*, supra, here the judge made ample findings to link Elizabeth's mental illness to her incapacity to care for herself as required by the statute. These include, among others, the findings that Elizabeth has a failure of memory so pervasive that it affects her ability to function; a mental condition rendering it difficult for her to maintain a habitable environment; an inability to manage independently her nutrition or follow a medication schedule; a lack of understanding of the value of her house, its condition, how to renovate it or the need to renovate it; and an unrealistic fixation on shortly returning to live in an uninhabitable house and her lack of understanding that she contributed to its condition. All of these findings, among others, support the judge's conclusion that Elizabeth is incapable of caring for herself by reason of mental illness. We find no error.

We find no merit in Robert's remaining arguments. His allegations of inadequate medical certificates are belied by a review of the faces of the certificates and the judge's orders. For example, the judge's notation that "upon receipt [of an] updated medical certificate the appointment will be renewed" does not support Robert's argument that appointment of the temporary guardian was extended without a medical certificate. In addition, none of the cases cited by Robert suggest that the judge wrongfully excluded the testimony of the brother's psychiatrist for failure to provide to Elizabeth the protections contained in G. L. c. 233, § 20B, or that G. L. c. 233, § 20B, applies to the testimony of Elizabeth's primary care physician.

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self changed his mind, albeit in reverse, regarding Elizabeth's condition, transforming himself from the original petitioner for guardianship to an opponent of such an appointment.

Finally, Robert objects to entry of an order extending an existing temporary guardianship of Elizabeth pending appeal. The order was entered on February 11, 2002, thirty-one days after the date of examination (January 11, 2002) indicated on the medical certificate. Robert argues that this violates both G. L. c. 201, § 14, and Uniform Probate Court Practice XXII (West 2003), the latter of which states that "[a] physician's certificate, when accepted, must be dated and the examination must have taken place within thirty (30) days prior to the entry of each decree, temporary or permanent" regarding guardianship or conservatorship. Passing the question whether Robert has actually appealed with respect to this order (there being no copies of the notices of appeal in the appendix), we find no requirement in G. L. c. 201, § 14, of a medical certificate. That statute requires only that the court find that the welfare of the ward requires the immediate appointment of a fiduciary. That finding can be made on any sufficient evidence, and does not require a medical certificate. Here, the judge could permissibly take notice of the findings on the merits entered less than three months earlier of mental illness and resulting incapacity so severe that it would be highly unlikely to dissipate. Uniform Probate Court Practice XXII does not create a requirement that there be a medical certificate, providing only that, if a certificate is accepted, not more than thirty days may elapse between the examination and the order. We discern no error. Even were there error, we deem the error *de minimus* in light of the circumstances and the fact that it is Robert's appeal that has stayed the time at which a permanent guardian will assume responsibility.

Decrees appointing permanent guardian and temporary guardian pending appeal affirmed.

By the Court (Cowin, Mills & Green, JJ.),

s/Ashley Ahearn
Clerk

Entered: August 5, 2003

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. PROBATE AND FAMILY COURT
DOCKET NO. 00P0417

IN RE GUARDIANSHIP
0F ELIZABETH GILL

Memorandum of Decision

This matter is before the Court on the request of Robert P. Gill and Ann M. Gill to withdraw their pending petition for guardianship of Elizabeth Gill ("ward") and the petition of James Nelligan, as temporary guardian for authority to sell real estate of said Elizabeth Gill. Petitioners were represented by Owen O'Malley Esq. Attorney Kathleen Keville was appointed as Guardian ad litem for ward. Ward's competency and need for a Guardian is in issue.

Procedural History

On February 24, 2000 Robert P. Gill and Ann M. Gill filed a petition for appointment of a permanent guardian of Elizabeth Gill (hereinafter "ward"), age 71, asserting said ward was incapable of caring for herself by reason of mental illness and unable to make or communicate informed decisions due to physical incapacity or illness. (Ex. 15). Robert Gill is the brother of ward and Ann Gill, Robert's wife, is her sister-in-law. No medical certificate was filed in support of this petition. The petitioners prayed for the appointment of Robert F. Gill as guardian of the ward's person and estate.

A citation issued on the petition returnable on March 30, 2000.

On March 29, 2000 a petition for conservatorship was filed by Elizabeth Gill, asserting her incapacity to care for herself by reason of physical incapacity and asking that Atty. Peter Macy be appointed as her conservator. The petition was allowed without notice (Moriarty J.) on that date. The petition was accompanied by an affidavit or ward, asserting her brother had filed the guardianship petition improperly and that in order to avoid the humiliation of her appearing in Court she had elected to name her own conservator and asking that the appointment be allowed so that there would be no need to hear the guardianship petition. Atty. Macy also filed that date a motion to dismiss the guardianship petition on which no immediate action was taken by the Court. The motion asserted that petitioners (brother and sister in law) were personally interested in managing ward's estate and their interests were in conflict with ward.

In support of her petition the ward filed a medical affidavit of Dr. Carol Waldmann (Ex. 1) dated May 1, 2000 asserting she had been the primary care physician of ward for two years, seen her regularly, and that ward is "clearly capable of making her own medical decisions". Doctor Waldmann testified in her affidavit that ward reports medical problems as they occur, responds appropriately to treatment recommendations and takes medications prescribed to her in the appropriate amounts and that in her opinion there was no basis to appoint a guardian for medical decisions. As to other decisions in ward's life, Dr. Waldmann testified by affidavit that ward demonstrated consistently a capacity to seek out supportive relationships with caregivers and a willingness to respond to their guidance with respect to her living and financial decisions. The doctor considered such behavior highly functional for a person with "occasional judgment problems".

The Court (Moriarty J.) spoke with the ward at the time the conservator's petition was presented for allowance and she appeared to appropriately respond to questions.

On May 3, 2000 the Court appointed Atty. Keville as guardian ad litem for the ward on the pending motion to dismiss the guardianship. She filed an extensive first of two reports dated March 27, 2001 (Ex. 6). discussed infra. The delay was occasioned by delay in completion of a neuropsychological evaluation of ward requested by GAL.

On December 18, 2000 the ward wrote Conservator Macy a letter purporting to "fire" him and directing him to resign as her conservator and attorney.

On January 2, 2001 a petition was filed ostensibly by Robert F. Gill and the ward, Elizabeth Gill, praying that Conservator be removed as he was making plans to sell ward's house without her knowledge or consent and contrary to her wishes. The petition itself was signed by Robert and the ward. Atty. O'Malley (Robert Gill's counsel) signed a motion for short order of notice, purportedly on behalf of Elizabeth. Atty. O'Malley also filed an affidavit dated January 2, 2001. In the affidavit he represented that ward had asked him to represent her in the removal action. (The attempted dual role of representation of Robert and Elizabeth by Atty. O'Malley is discussed infra). The Court allowed the short order (Moriarty J.).

On January 29, 2001 the Conservator filed an opposition to the removal petition, asserting *inter alia* that Robert had said earlier that he had offered to buy the ward's house for $50,000 (which is below value) and that he would repair and share it with the ward and that

Robert's counsel had stated that Robert would not assent to any petition for license to sell the house unless he, Robert, received one half the proceeds.

On March 29, 2001 GAL Keville filed a motion for appointment of a temporary guardian of the ward and on March 29, 2001 Atty. James Nelligan was appointed temporary guardian until June 25, 2001 (Sahagian J.). An affidavit was submitted by ward's physician, Dr. Waldmann (who had previously asserted ward was competent at time of conservatorship) asserting that ward was mentally ill to the degree that she was incapable of caring for her personal and financial affairs. Notwithstanding, Dr. Waldmann considered that the ward retained her capacity to make most personal medical decisions. She stated also that ward repeated her consistent belief that she can return to living independently in her house and return to work which statements demonstrate "poor insight into her condition and poor judgment". Dr. Waldmann concluded that ward's inability to perform executive functions, her poor insight and judgment and obsessive compulsive disorder, make her unable to maintain a safe living environment, and it is in ward's best interests to have a legal guardian appointed. (Ex. 2).

In her affidavit, Dr. Waldmann testified that at the time she completed the affidavit for the conservatorship, some months earlier, ward stated she had suffered verbal and emotional abuse from her brother (Robert). Ward feared her brother was trying to seize her belongings.

Thereafter, on April 3, 2001 Atty. O'Malley filed a motion for reconsideration of the appointment of temporary guardian requesting, on behalf of Robert Gill, that there be a further hearing on the issue of ward's competency. GAL Keville filed an opposition.

This motion was denied April 26, 2001 (Sahagian J.).

A motion appears to have been filed March 27, 2001 by Robert Gill personally asking that his name be withdrawn from the motion to remove Peter Macy as conservator. The motion also is signed by Atty. O'Malley. No action was taken on the motion.

An ongoing issue in this case is Atty. O'Malley's efforts to represent both Robert Gill and Elizabeth Gill and his disagreement with the Court's determination that he cannot represent Elizabeth Gill. See discussion infra.

On April 26, 2001 Temporary Guardian Nelligan filed a motion for further orders including that he be authorized to allow ward's family access to her real estate at 181 Perham St. West Roxbury to remove their personal property; thereafter that he be authorized to have the residence cleaned out (there are racoons living in the attic) and extensive trash and disposed of consistent with appraisers reports of the property; and that he be authorized to place the real estate on the market for sale subject to allowance of a license to sell from the Court.

Atty. O'Malley, on behalf of Robert and purportedly the ward, Elizabeth, filed an opposition to further orders.

Temporary Guardian's motion was allowed on May 8, 2001 except that ward's family was given 30 days to remove their possessions; and that the temporary guardian was to file a petition for sale of real estate if he sought such authority. (Moriarty J.).

On May 8, 2001 an affidavit was submitted ostensibly of Robert and ward representing that they were in

agreement with respect to the real estate and both strongly opposed its sale.

Also on May 8, 2001 the Court (Moriarty J.) allowed Atty. O'Malley's motion, on behalf of Robert Gill, for a copy of GAL Keville's report provided that it was not to be further copied. The Court specifically directed that as Atty. O'Malley was representing petitioner he may NOT represent the ward. (There had been a succession of pleadings in which Atty. O'Malley purported to represent either Robert, Elizabeth or both).

On June 13, 2001 Atty. Nelligan, as temporary guardian, filed a petition for license to sell ward's real estate at 181 Perham St. West Roxbury for $175,000. Temporary Guardian's inventory, filed June 13, 2001, shows as ward's assets the aforesaid real estate valued at $150,000 and no personal estate.

The Court set a hearing on June 19, 2001 for Temporary Guardian's request for GAL on the petition to sell. On June 19, 2001 GAL Keville was reappointed as guardian ad litem on the petition to sell. She filed a report assenting to sale.

On June 19, 2001 Atty. Nelligan moved for extension of his appointment as temporary guardian for an additional 90 days as a hearing would have to be scheduled on the pending motion of Robert to dismiss the guardianship petition and the allowance of the appointment of permanent guardian.

On June 19, 2001 the Court scheduled the petition for appointment of permanent guardian and the petition for license to sell real estate for a contested hearing on

July 16, 2001 and further ordered that medical doctors who would be called as witnesses as well as the ward were to be present. Atty. O'Malley was further directed to notify Atty. Nelligan, temporary guardian, by July 10, 2001 if he intended to call a medical expert and to provide his/her identity and a curriculum vita. No updated medical certificate was presented in support of the motion to extend the temporary guardian's appointment. Robert opposed the motion to extend. Accordingly the Court ruled that upon receipt of such certificate the appointment would be extended until the hearing on July 16, 2001. This certificate was not received, the appointment was not extended but lapsed which became problematic as later events discussed herein developed.

Hearing

Hearing was held July 16, 2001 and September 20, 2001.

I note at the outset that ward, age 71, is hard of hearing and a hearing aid was made available to her for the proceeding. I have considered the possibility that ward might not always hear correctly when answering and that such inability to hear may impact her ability to understand and answer. Nonetheless, I find ward needs a permanent guardian for reasons set out herein.

The principal evidentiary ruling involved testimony of ward's competence. Counsel O'Malley had ward examined, apparently without the temporary guardian's knowledge, by a psychiatrist Dr. Karl Kuniholm who was called as a witness. At voir dire it was determined that he had not given the ward *Lamb* warnings, as required by **Commonwealth v Lamb**, 365 Mass. 265 (1974) and

accordingly, the Court would not let him testify as to conversations with the ward but ruled counsel could ask the doctor questions not involving her testimony such as observations regarding her demeanor etc. Indeed Doctor indicated he did not know what term "*Lamb* warnings" meant. During a recess Doctor asked Ms. Gill if she would authorize him to testify as to her conversations and he states she said yes. Given that the threshold issue of competence was before the Court, I did not find this to be a waiver. I informed counsel that the issue may be overcome if a GAL were appointed regarding waiver of the privilege. Atty. O'Malley did not seek to call Doctor further. Counsel felt "ambushed" by the *Lamb* warning issue and the "technical" ruling of the Court. He then filed a motion to strike testimony of ward's attending physician Dr. Carol Waldmann, who is an internist and primary care physician and not a psychotherapist. I find she does not come within the definition of psychotherapist as set out in G.L. c. 233 s 20B and accordingly I denied the motion to strike.

At the close of the evidence this Court discussed with counsel submitting proposed findings of fact. During said discussion, petitioner's counsel, Owen O'Malley, raised for the first time some doubts about the signature of the deed conveying the real estate in issue to Elizabeth Gill from her mother about 1982. The Court inquired about the title and during the ensuing colloquy learned for the first time that, during the pendency of this proceeding, and during the hearing, (which took place July 16, 18, 20, 2001) a deed had been executed on July 18, 2001 by Elizabeth Gill conveying said real estate to herself and Ann Gill, her sister in law, who is co-petitioner on the Petition for Appointment of Guardian, as joint tenants with right of survivorship. The deed was for nominal

consideration. Atty. O'Malley acknowledged the deed was prepared and notarized by him.

The deed was executed while trial was **in progress** before this Court to determine the competency of Elizabeth Gill, and whether a permanent guardian should be appointed of her person and estate and whether a pending application for license by the then temporary guardian to sell the aforesaid real estate should be issued by this Court. The petition for appointment of guardian, alleging the ward was mentally ill, was filed by Atty. O'Malley on behalf of the Gills who now seek to dismiss their petition. On May 8, 2001 this Court entered a formal order that Atty. O'Malley, as he was representing petitioners could not also represent the ward Elizabeth Gill. A guardian ad litem, Attorney Kathleen Keville, had previously been appointed to represent the ward.

When asked how this conveyance happened counsel O' Malley replied that the appointment of the temporary guardian had lapsed July 16, 2001 and that Elizabeth Gill was a "free agent" to execute this deed. It should be noted that the temporary appointment of a guardian of a person and estate of Elizabeth Gill was granted, over objection of petitioners on March 29, 2001 (Sahagian J.). On June 19, 2001 this Court indicated it would extend the temporary appointment until trial, upon filing of an updated Doctor's certificate. Doctor Waldmann apparently was out of town and no such certificate was filed. Therefore, the appointment of the temporary guardian had lapsed as of July 16, but the issue of ward's competency to care for herself, her affairs, and her real estate was very much before the Court and the very issues which this Court was being called upon to decide.

In response to the Court's questions, Elizabeth Gill initially had no recollection of signing this deed, before being prompted by Atty. O'Malley.

The Court on its own motion entered an order on July 20, 2001 restraining the ward and Ann Gill, who was present in the courtroom, and in whose presence the court read the order, prohibiting either of them from conveying, devising, mortgaging, bequeathing, or exercising any control over said property without written order of Court. The Court also instructed the Guardian ad litem to file a motion for lis pendens, allowed by the Court, and to record same in the Registry of Deeds forthwith.

At issue throughout this case has been ward's competency, and whether she needs a guardian and whether petitioners are suitable for that task. An underlying theme of the case has been her relationship with her brother, whether she wants him to manage her affairs, and whether he should be permitted to take control of this real estate.

I find preparation and execution of this deed, which the proposed ward signed, while the issue of her competency and the status of the real estate was before the Court, is completely inappropriate and appears to be an attempt to put the property beyond the control of the Court, so that if the Court appointed a Guardian and authorized the sale of this property, the ward would not own it all. Also if Elizabeth Gill died, it would pass outright to Atty. O'Malley's client. The property, while uninhabitable, and in need of serious repair nonetheless has a value of about $175,000 (the amount of an offer received by Atty. Nelligan). The prior conservator, Atty. Macy had also received an offer of about $150,000.

Ward has been consistent throughout this proceeding in wanting to go home and in not wanting her home sold. However, I am not persuaded that the Gills are acting solely in the ward's interests in opposing this sale.

Given the colloquy regarding execution of the deed and the threshold issue of competence, I appointed Dr. William Hudgins to do an independent examination of ward for the Court and Atty. Chick Maroni as guardian ad litem on the issue of waiver of the patient/psychotherapist privilege with regard to the evaluation of Dr. Kuniholm, the petitioner's expert. If the gal waived the privilege, I indicated petitioner's expert could testify as to conversations with ward. See order of August 1, 2001 as of July 27, 2001. Atty. Maroni subsequently filed a GAL report declining to waive the patient/psychotherapist privilege of Dr. Kuniholm.

I also note counsel O'Malley objected to not having a copy of the report of guardian ad litem Kathleen Keville for hearing. However, on his motion, this Court on May 8, 2001 allowed him to have a copy of the report and the motion reflects notice of the Court's order was sent on May 10, 2001.

At the hearing on July 16, ward's physician, Dr. Carol Waldmann testified.

Based on the credible evidence I find that:

Ward, age 71, currently resides at Spring House, an assisted living facility. She has no spouse or children and was one of four siblings. Ward has serious physical disabilities including severe osteoarthritis, degenerative joint disorder, left total hip replacement, and past history of substance abuse.

Dr. Waldmann is a primary care physician and some sixty percent of her practice involves patients with substance abuse or mental illness. She first met Ms. Gill when she was transferred from Brigham and Womens hospital to McInnis house after breaking an arm at home. The McInnis house is a transitional residential program for homeless women. At that time, given the condition of her home, Department of Public Health would not let her return home. She has been Ms. Gill's primary care physician since about 1997. At their initial meeting Ms. Gill was quiet, and upset at her situation. She wanted to return to her house and was unhappy she couldn't do it. It was unclear to Dr. Waldmann initially how much of Ms. Gill's difficulties were physical rather than mental. Ward would focus on a topic, such as allergies (she clears her throat constantly due to "allergies" which medically she does not have) and washes her hands obsessively to the point where her hands have become raw. Her hands bled and cracked, and she had severe dermatitis such that she was placed under care of a dermatologist. She was at McInnis house for several weeks, then had a hip replacement and spent four months at Benjamin Moore Health and Rehabilitation Care before being transferred to her assisted living situation at Spring House three years ago in 1998. It was impossible for her to return home, given the deplorable condition of the house. After hip replacement her ability and appearance improved markedly. However, at Spring House, she continued a pattern of not throwing things away and hoarding such that her room became infested with rodents, requiring staff intervention. The condition of the room was discovered when ward began sleeping in the hallway. Staff now inspect the room monthly. It had taken staff some effort to persuade ward to straighten room out.

Dr. Waldmann testified she discussed ward's family with her. Ward expressed fear that her brother would take advantage of her. At time she signed the conservatorship affidavit Dr. Waldmann believed ward could function with the assistance of a conservator. Since then her condition has become worse and it has become clear her ailments are mental and not physical. She is no longer able to make decisions in her best interests due to mental illness. She has become more confused and is pulled in different directions. At present time she is unable to make all her own medical decisions, particularly as they relate to living independently. Dr. Waldmann felt she could make small medical decisions but had no present capacity to make life or financial decisions or to live independently, particularly given her compulsion to hoard and handwash. She lacks mobility to shop and cook. Her mental condition is such that it is difficult for her to maintain a habitable environment. Ms. Gill, Dr. Waldmann testified, and I find, has no insight as to why she had to leave her house nor about the way she was living when Emergency Medical technicians took her from the house which was found with trash, urine and feces. However, she does not have any major affective disorder or psychosis. Her mental illness however impacts in a debilitating way her ability to function and she can't function safely regarding her estate. Dr. Waldmann had referred the ward for psychiatric care but ward declined.

Dr. Waldmann testified ward needs assistance with hygiene, nutrition and medication and needs a high level of assisted living. Dr. supports an appointment of a guardian which would also give the ward as much autonomy as possible.

In her interviews with GAL Keville, ward indicated she had been a long time office worker with Children's Hospital before being let go from her job. She could not initially recall her job responsibilities and could not recall why she was let go. (Ex. 6). Ward was initially unable to recall her home address. She indicated she would be going home within a month and would not need help to care for herself, a fact contravened by the actual condition of her physical and mental health.

Ward also informed GAL Keville that the legal issues relative to the guardianship and conservatorship related to "my brother wants to control the house, that's about it" (Ex.6). Ward also told Doctor Waldmann in early 2000 that her brother had tried to convince her to sign the house over to him. She declined and subsequently legal proceedings for guardianship began.

The ward was referred by GAL for psychological testing. While the evaluation did not reach a conclusion with respect to competency, it indicated that ward performed well within the structure of assisted living, but performed poorly if living alone.

Ward also described a long history of verbal abuse by her brother and father to social workers (Ms. Volk and Ms. Matchek) at a private geriatric care management agency. This verbal abuse may have related in part to some physical disabilities of the ward but the effect was that it left ward depressed and with low esteem.

Initially after entering Spring House ward did spend some holidays with her brother but social worker reported she balked when brother began raising issues about the home.

The case came before the Court again on Sept. 20, 2001 for status conference.

The Court allowed Temporary Guardian's motion to reopen the evidence to call Dr. Hudgins and admit his GAL report. (Ex. 16). Dr. Hudgins was present and cross-examined by Atty. O'Malley.

Dr. Hudgins is a psychologist, appointed by the Court to review the issue of ward's competency. He does considerable work in District Court evaluating defendants' competency to stand trial. During these proceedings Ms. Gill was present, having been brought to Court by Atty. O'Malley's clients but she appeared to doze off during testimony. Dr. Hudgins had met with her on three occasions. She suffered serious memory deficits in her conversations with him. She was, however, adamant she did not want her house sold. Where, as here, failure of memory is extensive and consistent, it indicates the need for the Guardian, particularly where as here the memory failure is so pervasive that it impacts how she is able to function. Dr. Hudgins concluded, and I so find based on the totality of the evidence, that she clearly needs a guardian of her estate or a conservator to manage her finances. Dr. Hudgins testified that many times she was unable to answer a question because she was not capable of formulating an answer in her mind so she would put it off by indicating she would think about it.

Ward gave Doctor Hudgins a fair market value of her real estate at thirty thousand dollars, which is grossly inadequate. Her responses reflected she was not aware of the extent of repair work which needed to be done. Ms. Gill did not want doctor to verify her prior employment at Childrens' Hospital, something doctor very much wanted

to do to see how she presented herself physically during this time and to learn if anyone had any concerns about her appearance or manner. She was aware Doctor's role was to determine if she is competent. During his interview, it was very clear to GAL that Ms. Gill did not want her house sold but she was unrealistic in thinking she could return there. She had no ability to process the amount of repair work which would need to be done, the cost of such repairs or how she would go about such undertaking. Doctor Hudgins was also concerned that she had apparently discharged her doctor and made no efforts to obtain a follow up primary care physician such that her medical care would largely be left to emergency room intervention in the future.

Ward currently lives at an assisted living facility, Spring House, where she does quite well at present. Both Dr. Waldmann and Dr. Hudgins testified, and I find, she has improved with the structure and socialization opportunities offered there. She is well liked there and socializes with others at the house. This is in contrast to what appears a much more isolated lifestyle when living at home. Dr. Hudgins testified, and I find, she is incapable of living on her own. She would not be able to manage her nutrition and eat three meals daily (she has gained weight at Spring House), she would not be able to follow a medication schedule without monitoring.

I find she is incapable by mental illness of managing her estate. While she understands she has a house, she has no idea of it's value, it's condition or how to renovate it and does not appreciate the need to renovate it.

While under conservatorship, Atty. Macy had, at ward's desire and in an effort to keep the fewest restrictions on ward's assets, left her in charge of a small bank

account but she failed to pay her expenses at Spring House resulting in an arrearage.

I find she is incapable of caring for herself by reason of mental illness. While she can take care of daily activities with guidance and direction, she has no ability to understand her medical care and \make informed decisions, given significant physical impairment, her symptoms of obsessive compulsive disorder, memory loss, inability to process more complicated information, unrealistic fixation of thinking she can return home to live in a house that is uninhabitable and her lack of understanding that she contributed to its current uninhabitable condition.

Real Estate

Ward has not lived in her home in close to six years since 1996 (Ex. 16). The house is in very serious disrepair and it is not even habitable. (See for example photos attached to appraisal in Ex. 4). It is vermin infested.

Ward has no realistic ability, given her mental and physical deficiencies, to return home to live. Such desire by her is, in reality, a fantasy. It's in her best interests that the home be sold before it further deteriorates and is condemned and that the sale proceeds be applied for her benefit.

No credible plan was presented by petitioners to GAL or otherwise to rehab the house and it is not realistic that the house be renovated and that petitioners and ward live there together. (Ex. 16). Ward's relationship with her brother is strained and for two years petitioner had little contact with ward in the 1990's.

Atty. Macy, as conservator, explored the viability of various options including renovation and establishing an in-law apartment in the home with petitioners and ward and determined it was not feasible given cost and zoning issues. Atty. Macy's appraiser was unable to view all the rooms in the house, due to clutter and unsafe conditions, but had placed an estimated value on the property in April 2000 of $195,000 if restored to broom clean condition. GAL Keville was also unable to view the entire house upon inspection as "trash, stacks of newspapers, other debris and filth were piled everywhere including all the way up the stairway to the second floor". (See GAL report).

Atty. Nelligan has a prospective purchaser for the real estate, a contractor, for $175,000 and has signed a purchase and sale agreement subject to the Court issuing a license to sell if he is appointed permanent guardian.

The terms of the purchase and sale agreement call for the property to be sold in its "current condition" and any condition discovered during clean up will not be grounds to terminate or nullify the agreement. (EX 14) GAL assents to petition.

I find ward is in need of a guardian of her person and estate and I find ward's brother, on the facts found herein, is not suitable to be appointed her guardian, given their relationship and his conduct with respect to the house.

Accordingly, it is ordered as follows:

1. The petitioners' request to withdraw their petition is denied.

2. The temporary guardian, James Nelligan, is appointed as permanent guardian of the person and estate of Elizabeth Gill.

3. A deed is to be executed forthwith by Atty. Nelligan as guardian of the ward and by Ann M. Gill reconveying the real estate at 181 Perham St. West Roxbury to the ward individually.

4. Upon said reconveyance, the license to sell real estate by the Guardian for $175,000 is granted.

November 20, 2001

s/Elaine M. Moriarty
Elaine M. Moriarty
Judge of Probate and Family Court

By Mr. O'Malley: (Dr. Carol Waldmann)

A: -- have gotten the wording from either -- either from a lawyer or an, you know --

Q: I'm just going --

A: -- (inaudible) --

Q: Okay.

A: -- probably, but I, I -- it really needs to be clear that I wasn't counseled what to say. That I mean I think what you're, what your implying is that I was somehow manipulated or counseled what to say by a lawyer. And that is in no way the case. I mean I -- I'm, I'm, I'm a professional physician.

Q: All right. (Inaudible) --

A: I just want to finish my statement -- and you know, I care very much about my patients. I think it's a very difficult case. It's very complicated. And I think that, you know, um, the way that -- which you're asking me these questions, (inaudible) and I just want to make it very clear that I wasn't counseled what to say or what I needed to say or, or anything of the sort.

Q: Thank you. Ah, doctor, I, I'm repeating this because you repeated it. I'm not trying to make -- to beat the -- a dead horse so to speak. You repeated within two paragraphs.

Constitutional Provisions
AMENDMENTS TO THE CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS

GUARDIANS AND CONSERVATORS C.201 § 14

TEMPORARY GUARDIANS

C. 201 § 14. Appointment of temporary guardians; removal; commitment of minors, mentally ill, or mentally retarded persons; treatment with antipsychotic medication.

(a) Upon the petition of any agency within the executive offices of human services or educational affairs or other person in interest, the court may, if it finds that the welfare of a minor, a mentally ill or mentally retarded person or spendthrift requires the immediate appointment of a temporary guardian of his person and estate, appoint a temporary guardian of such minor, mentally ill or mentally retarded person or spendthrift, with or without notice, and may in like manner remove or discharge him or terminate the trust; or in the absence of a person to serve as temporary guardian, the court by order or decree may authorize and monitor, as appropriate, medical treatment; provided, however, that if the court makes the findings required in paragraph (c) it shall authorize treatment with antipsychotic medication and shall, in the absence of a person to serve as temporary guardian, appoint a suitable person to monitor the treatment process to ensure that the treatment plan approved by the court is followed. A temporary guardian may proceed and continue in the execution of his duties, notwithstanding an appeal from the decree appointing him, until it is otherwise ordered by the supreme judicial court, or until the appointment of a permanent guardian, or until the trust is otherwise legally terminated. Reasonable expense incurred in such monitoring may be paid out of the estate

of such person, by the petitioner, or, subject to appropriation, by the commonwealth, as the court may determine.

(b) No temporary guardian so appointed shall have the authority to cause to admit or commit such minor, mentally ill or mentally retarded person or spendthrift to a mental health or retardation facility unless the court specifically finds the same to be in the best interests of such person and specifically authorizes such admission or commitment by its order or decree.

(c) No temporary guardian so appointed shall have the authority to consent to treatment with antipsychotic medication, provided that the court shall authorize such treatment when it (i) specifically finds using the substituted judgment standard that the person, if competent, would consent to such treatment and (ii) specifically approves and authorizes an antipsychotic medication treatment plan by its order or decree.

(d) The court shall not authorize such admission or commitment or treatment with antipsychotic medication except after a hearing for the purpose of which counsel shall be provided for any indigent person subject to such admission or commitment or such treatment and the court shall require the attendance of such person at such hearing unless the court finds that there exists extraordinary circumstances requiring his absence, in which event the attendance of his counsel shall suffice; provided that the court may base its findings exclusively on affidavits and other documentary evidence if it (1) determines after careful inquiry and upon representation of counsel, that there are not contested issues of fact, and (2) includes in its findings the reasons that oral testimony was not required; provided, however, that in cases of extreme

emergency the court may authorize an admission or commitment by an ex parte proceeding, if it finds that the remedies under the emergency provisions of section twelve of chapter one hundred and twenty three are not applicable or would not be available to deal with the present emergency.

(e) No separate petition shall be necessary for the appointment of a temporary guardian, and, except as otherwise specified herein, the procedures relative to filing, notice, hearings, and related matters normally incident to equitable proceedings and relief prior to final decree, shall apply to these proceedings, provided that a hearing on a request to authorize the administration of antipsychotic medication shall be held as soon as is practicable, and the principles of equity normally applicable to the issuance, denial and expiration of temporary or preliminary relief and orders shall also so apply.

(f) Whenever a temporary guardian is so appointed, the decree or order shall indicate the nature of the emergency requiring such appointment and the particular harm sought to be avoided, and shall state that the temporary guardian so appointed is only authorized to take such actions with regard to the ward as are reasonably necessary to avoid the occurrence of that harm.

(g) Any privilege established by section one hundred and thirty-five of chapter one hundred and twelve or by section twenty B of chapter two hundred and thirty-three, relating to confidential communications, shall not prohibit the filing of reports or affidavits, or the giving of testimony, pursuant to this section, for the purpose of obtaining treatment of a mentally ill or mentally retarded person; provided, however, that such person has been

informed prior to making such communications that they may be used for such purpose and has waived the privilege.

Amended by St.1941, c. 194, § 16; St.1956, c. 314, § 7; St.1974, c. 260, § 28; St.1976, c. 277; St.1977, c. 567, § 3; St.1985, c. 525, § 3.

SUPREME JUDICIAL COURT
RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(**a**) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation

(**b**) A lawyer shall not represent a client if the representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

PRACTICE XXII. PHYSICIAN'S CERTIFICATE (GUARDIAN-CONSERVATOR)

A physician's certificate, when accepted, must be dated and the examination must have taken place within thirty (30) days prior to the entry of each decree, temporary or permanent.

A-35

Medical Certificate

Commonwealth of Massachusetts
The Trial Court
_____ Division
Probate and Family Court Department
Docket No._____

MEDICAL CERTIFICATE — GUARDIANSHIP

To the Honorable Justices of the Probate and Family Court:

The undersigned hereby certifies under the penalties of perjury that I am a registered physician and that

I personally examined _____
(name of proposed ward)

_____
(street address) (city or town) (state)

on _____
(date of examination)

and in my opinion the proposed ward:

❑ is a mentally ill person to the degree that he/she is incapable of caring for his/her personal and or financial affairs.

❑ is a person who is unable to make or communicate informed decisions due to physical incapacity

➡ **THIS SECTION MUST BE COMPLETED FOR A GUARDIANSHIP PETITION**

Describe in detail the diagnoses leading to the aforementioned opinion (including the types of decisions which the proposed ward has sufficient mental ability to make):

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Date _____

_____
(signature)

_____
(PRINT name)

_____
(address including zip code)

_____

Tel No. _____

Uniform Probate Court Practice XXII

A physician's certificate, when accepted, must be **dated** and the **examination** must have taken place, within **thirty (30) days** prior to the entry to each decree, temporary or permanent.